IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. **76-1322**

ELDON RAYBOURNE CHRISTIAN,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Opinions Below

The judgment of the Court of Appeals (App. A, infra, P. 17) was rendered pursuant to written opinion (App. B, infra, P. 19). The District Court judgment was rendered on jury verdict and no written opinion was entered. The order and opinion of the District Court denying Petitioner's motion to suppress is annexed hereto as App. C, infra, P. 26.

Jurisdiction

The judgment of the Court of Appeals was entered on the 22nd day of February, 1977. This court has jurisdiction under 28 U.S.C.A. 1254 (1).

Companion Case Proceedings

The seizure which is the subject of the instant application was made by State law enforcement officials pursuant to search warrant issued by a Judge of the District Court, Oklahoma City, Oklahoma on the 26th day of February, 1975 pursuant to affidavit sworn to the 26th day of February, 1975, both of which form a single document (App. D, infra, P. 30). The order of the District Court of Oklahoma County, State of Oklahoma granting Petitioner's motion to suppress (App. E, infra, P. 32) was rendered pursuant to a stipulation of fact (App. F, infra, P. 34), said order setting forth the basis for the court's determination without further opinion.

Questions Presented

1. Whether a warrant for the search and seizure of a motion picture film from a motion picture theatre in the midst of its exhibition without prior judicial scrutiny by the issuing magistrate of the expression presumptively by the First Amendment does not constitute a prior restraint and illegal search and seizure within the meaning of the First, Fourth, and Fourteenth Amendments of the United States Constitution by reason of the total absence, prior to issuance of the warrant, of a procedure designed to focus searchingly on the question of obscenity under the doctrine enunciated in *Marcus* v. *Search Warrant,* 367 U.S. 717 (1961); *Lee Art Theatre* v. *Virginia,* 393 U.S. 636 (1968); *Roaden* v. *Kentucky,* 413 U.S. 496 (1973) and *Heller* v. *New York,* 413 U.S. 483 (1973)?

2. Whether the affidavit which formed the basis for the issuance of the search warrant and the consequent seizure of the film in the instant case set forth insufficient factual allegations to enable the issuing magistrate to focus searchingly of the issue of obscenity of the said film and deter-

mine probable cause of its obscenity vel non and, consequently, effectively resulted in the issuance of the warrant and the seizure of the film in the midst of its exhibition in a theatre solely on the basis of the conclusory allegations and ad hoc determinations of a police officer without effective intervention of the judicial mind, in violation of the First, Fourth and Fourteenth Amendments?

Constitutional Provisions Involved

1. First Amendment

"Congress shall make no law . . . abridging the freedom of speech or of the press . . ."

2. Fourth Amendment

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Preliminary Statement

Eldon Raybourne Christian, appeals from a judgment of the United States Court of Appeals for the Tenth Circuit, entered February 22nd, 1977, affirming a judgment entered in the United States District Court for the Western District of Oklahoma (Thompson, J.) on May 26, 1976, convicting him of using a common carrier for the carriage in interstate commerce of an obscene motion picture film entitled "Sexual Customs in Scandinavia", in violation of Title 18, United States Code, Section 1462.

Prior to trial, Petitioner moved to suppress the use and evidence of the motion picture film which was the subject of the indictment and which had been procured by the Gov-

ernment from local law enforcement officials in the State of Oklahoma after its use had been suppressed in the course of a State Court prosecution brought against Petitioner for violation of State obscenity laws by the showing of the said film. The motion to suppress was denied.

Reasons for Granting the Writ

In analyzing the issues presented on this appeal, one must begin from the basic proposition that movies, as well as books and other means of communication, are protected from government suppression by the First Amendment to the U.S. Constitution. The protection thus given to the expression of ideas, a protection which must be granted without regard to any judging authority's personal disagreement with, or distaste for, the ideas expressed, is the fundamental basis of our system of liberties and self-government. Although the Supreme Court has held that material which is "obscene" falls outside the protection of the First Amendment, *Roth* v. *U.S.*, 354 U.S. 476, the Court has, at the same time, in recognition of the important values embodied in the First Amendment, taken great pains to assure that suppression of presumptively protected material upon grounds of alleged "obscenity" takes place only after a searching judicial inquiry on the issue of obscenity has been had.

The record in the instant case, as discussed below, shows a gross failure to comply with the Supreme Court's applicable standards for the seizure of and restraint upon dissemination of presumptively protected expression. Without regard to the ultimate issue of the "obscene" or "non-obscene" nature of the film, admission of the illegally seized film into evidence at appellant's trial was improper and requires reversal of appellant's conviction. See *Lee Art Theatre* v. *Virginia*, 392 U.S. 636, 88 S. Ct. 2103, 20 L. Ed. 2d 1313 (1968) and *Roaden* v. *Kentucky*, 413 U.S. 496 (1973).

The seizure of material by law enforcement officers on grounds of obscenity potentially violates both the First Amendment, guaranteeing freedom of expression, and the Fourth Amendment, guaranteeing freedom from unreasonable searches and seizures. Especially with regard to the First Amendment, not only are the rights of the owner of the material involved, but also the rights of the potential audience are significantly at stake. This confluence of rights under the First and Fourth Amendments, and of rights on behalf of more than one person, was examined by the Supreme Court in *Roaden* v. *Kentucky*, 413 U.S. 496 (1973), where the Court was led to conclude that a "higher" than ordinary "hurdle" must be met in the issuance of warrants for the seizure of expressive matter, as opposed to non-expressive matter. The Court there stated:

> The Fourth Amendment proscription against unreasonable . . . seizures, applicable to the States through the Fourteenth Amendment, must not be read in a vacuum. A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material . . . The seizure of instruments of a crime, such as a pistol or a knife, or contraband or stolen goods or objects dangerous in themselves . . . are (sic) to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under Fourth or Fourteenth Amendment standards". 413 U.S. at 501-502.

The Court in *Roaden*, after reviewing earlier decisions, continued:

> "In each case the material seized fell arguably within First Amendment protection, and the taking brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition. Seizing a film then being exhibited to the general public presents essentially the same restraint on expression as the seizure

> of all the books in a bookstore. Such precipitate action by a police officer, without the authority of a *constitutionally sufficient warrant,* is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards. The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. The setting of the bookstore or the commercial theatre, presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is 'unreasonable' in the light of the values of freedom of expression." (Emphasis added). 413 U.S. at 504.

Thus, *Roaden* clearly held that a seizure which effects a prior restraint within the meaning of the First Amendment constitutes an unreasonable search and seizure under the Fourth Amendment.

In seeking to protect First Amendment rights, the Supreme Court early established that where a seizure is "massive," as with the confiscation of a mass of printed material, an adversary hearing *prior* to seizure is required. *Marcus* v. *Search Warrant,* 367 U.S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127 (1961). Since "seizing a film then being exhibited to the general public presents essentially the same restraint on the expression as the seizure of all the books in a bookstore," *Roaden* v. *Kentucky,* supra at 504, the same principles apply thereto.

Later, in *Heller* v. *New York,* 413 U.S. 483, 93 S. Ct. 2789, 37 L. Ed. 2d 745 (1973), the Court engrafted an exception upon the adversary hearing principle of *Marcus,* holding that where the seizure of a single item of presumptively protected expression is desired for use as evidence in a subsequent prosecution, the conduct of a prior adversary

hearing, prior to seizure of the evidence, with its attendant risk that the item might be destroyed or removed, is not always practicable. 413 U.S. at 493. The Court in *Heller* nevertheless recognized that where the item or items seized are copies of a film then being publicly exhibited, the effect of the seizure, in terms of its operation as a prior restraint and in terms of the denial of the public's access, is the equivalent of a "massive" seizure. 413 U.S. at 492-493. Thus, although the Court in *Heller* approved an alternative procedure to the requirement of a prior adversary hearing in cases of seizures of a single print of a publicly exhibited film to be used as evidence in a prospective obscenity case, the Court allowed omission of the prior adversary hearing only upon a finding that prior judicial scrutiny sufficed to permit the searchingly judicial inquiry which is a condition precedent to any restraint upon the dissemination of presumptively protected material.

In the instant case, the law enforcement officials seized both of the two copies of the same film in the exhibitor's possession, clearly evidencing the intention to suppress and effect a total prior restraint upon its exhibition rather than gather a single print for evidentiary purposes. Such seizure not only violated the specific command of *Heller* that seizure be limited to a single copy, but, more fundamentally, reveals that the real intended purpose of the seizure was to stop the showing of the film in violation of the First Amendment rather than to preserve evidence. The seizure of both copies of the film thus denied the film's presumptively protected nature and constituted a prior restraint of the very sort which the Supreme Court took aim against in *Marcus* v. *Search Warrant* and *Heller* v. *New York.* Thus, by the overly broad scope of the seizure, the First Amendment was violated. And, as established by *Roaden* v. *Kentucky,* discussed *supra,* where a seizure of presumptively protected expression constitutes a prior restraint in violation of the First Amendment, the seizure is unreasonable within the meaning of the Fourth Amend-

ment. Therefore, solely on the basis of the prior restraint effected by the multiple seizure, the seized film should have been excluded from evidence at trial since the *Heller* exception to *Marcus* principles is inapplicable. The approved procedure in *Heller* involved prior scrutiny by the judge of the film alleged to be obscene, determination by the judge of the obscenity vel non thereof, and the issuance by the judge of a warrant for the seizure of one copy of the film.

Where, as in the instant case, the pre-seizure adversary hearing is dispensed with, in deference to single-copy evidence-gathering interests, the need to assure the Constitutional sufficiency of the warrant becomes all the more urgent. In *Marcus* v. *Search Warrant,* 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed. 2d 1127 (1961), the Supreme Court held that procedures followed under a state statute in the seizure of a mass of printed, allegedly obscene publications violated the First Amendment. The Court proceeded from the premise that the "power of search and seizure [can] be an instrument for the stifling of liberty of expression" 367 U.S. at 729. Although conceding that obscene material "is not within the area of constitutionally protected speech or press," 367 U.S. at 730, the Court emphasized the requirement for "safeguards . . . to assure non-obscene material the constitutional protection to which it is entitled." 367 U.S. at 731. The Court concluded in *Marcus* that, in order to avoid a prior restraint in violation of constitutional guarantees, there must be a "step in the procedure *before seizure* designed to *focus searchingly* on the question of obscenity." (Emphasis added.) 367 U.S. at 732.

The Court squarely addressed the question of necessity for a warrant prior to an "obscenity" seizure in the case of *Roaden* v. *Kentucky,* supra, holding that the seizure of a film by a sheriff, after the sheriff's viewing of the film and upon the sheriff's conclusion that the film was obscene,

violated the First and Fourth Amendments and required reversal of the exhibitor's conviction. The defect found by the Court was again the absence of a step in the procedures prior to seizure affording "a magistrate an opportunity to 'focus searchingly on the question of obscenity.'" 413 U.S. at 506.

The mere obtaining of a piece of paper from a magistrate entitled "Search Warrant", however, clearly does not suffice to meet First and Fourth Amendment requirements for the seizure of expressive material. It requires no great perspicacity to appreciate that a warrant issued by a magistrate upon the basis of a police officer's conclusion that a film is obscene stands on no different footing that no warrant at all. *Lee Art Theatre* v. *Virginia,* 392 U.S. 636 (1968). The criterion, which is not satisfied in this situation (any more than it was in *Roaden*) remains that of whether the magistrate has "focused searchingly" on the issue of obscenity. Thus, in *Marcus* v. *Search Warrant,* 367 U.S. 717 (1961), there was a search warrant, but the Supreme Court held it constitutionally insufficient because:

> ". . . the warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene." 367 U.S. at 731-732.

The same defect in a warrant, requiring reversal of an exhibitor's conviction, was found by the Supreme Court in *Lee Art Theatre* v. *Virginia,* 392 U.S. 636 (1968), a case presented on the same footing and under facts virtually identical to those in the instant case. In *Lee Art Theatre* an allegedly obscene film was seized:

> "under the authority of a warrant issued by a justice of the peace on the basis of an affidavit of a police officer which stated only the titles of the motion pictures and that the officer had determined from personal observation of them and of the billboard in

front of the theatre that the films were obscene." 392 U.S. at 636.

The Court there stated:

> "The procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a procedure 'designed to focus searchingly on the question of obscenity,' and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression." 392 U.S. 637.

The warrant in the present case presents no significant difference from the warrant in *Lee Art Theatre*. In both cases, the affidavits forming the basis for the issuance of the warrant contain only the officer's conclusory assertions of obscenity. Here the officer, apparently believing that verbosity could substitute for substance, stated that the film's depictions were "filthy, morally foul, polluted, nasty, dirty, vulgar, debasing, having a tendency to corrupt or debauch, morally offensive and depraving lascivious, wanton and lustful, lewd, licentious, lecherous, dissolute, dehauched, impure, salacious and pornographic".

Although the affidavit here also states that the film showed "unnatural copulation" and "simulated natural sexual acts", and depicted "numerous scenes of sexual intercourse male and female, one female masturbating, and unnatural copulation between male and female," the addition of such statements cannot possibly be viewed as sufficient basis for a neutral magistrate to "focus searchingly" on the issue of obscenity and thereby justify the prior restraint worked against this presumptively protected expression. Quite apart from the question of what subjective criteria the officer used in designating some acts as "natural" and others as "unnatural", and apart from the consideration that this was presumably a selective chronicle of what the film contained, it is ludicrous to suppose that

the officer, in making his judgment of the film's obscenity, undertook an evaluation under the Supreme Court's carefully drawn and crucially important tri-partite test of obscenity. For one thing, the affidavit itself shows that the officer did not consider whether the film lacked serious literary, artistic, political or scientific value, an essential finding in any obscenity determination. Certainly the affidavit offers no basis for a searching determination by the Judge of such issue.

The common thread running throughout the Supreme Court's opinions in *Marcus* v. *Search Warrant, Roaden* v. *Kentucky, Lee Art Theatre* v. *Virginia,* and *Heller* v. *New York, supra* is that expressive matter is presumptively protected; that its seizure, even temporarily, constitutes a prior restraint which is as seriously violative of the First Amendment as any permanent and final seizure; and that, therefore, before there can be a seizure, even for evidence-gathering purposes, there must be "a step in the procedure . . . designed to focus searchingly on the question of obscenity." *Marcus* v. *Search Warrant,* 367 U.S. 717, 732. The further meaning of these cases, if they mean anything at all, is that the "focusing search," involving necessarily, as it does, application of the substantive obscenity standards, must be undertaken by "a disinterested magistrate" and not, as here, by law enforcement personnel in the field.

In *Marcus* v. *Search Warrant,* the Court stated, after noting "the complexity of the test for obscenity," 367 U.S. at 730,

> [T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools
>
> ". . . [D]iscretion to seize allegedly obsence materials cannot be confided to law enforcement officials" 367 U.S. 717, at 731.

In *Lee Art Theatre* v. *Virginia,* the Supreme Court spoke of "the constitutional requirements demanding necessary sensitivity to freedom of expression," 392 U.S. at 637, and in *Roaden* v. *Kentucky* it posited "[t]he constitutional impossibility of leaving the protection of those freedoms to the whim of [law enforcement] officers . . ." 413 U.S. at 504-505.

To say that the procedure followed in the instant case, issuance of a warrant upon the basis of a police officer's conclusory characterizations of the film and general references to type of sex acts depicted therein, was a procedure which allowed the magistrate "to focus searchingly on the question of obscenity," *Marcus* v. *Search Warrant,* 367 U.S. at 732, and was "adequate to avoid suppression of constitutionally protected [material]", *ibid.,* 367 U.S. at 731, borders on the absurd. That this is so, may be appreciated all the more fully when one bears in mind the Supreme Court's numerous statements to the effect that obscenity inheres not in the portrayal of one sex act or another, but rather in the manner of presentation and in the contextual entirety of the work. How the police officer's brief affidavit could have put the judge in position to evaluate the subtle and contextual factors which go into adjudicating the issue of obscenity is difficult, if not impossible, to conceive.

In the case of books and printed matter, the Supreme Court has indicated that a magistrate must personally view the material before issuing a warrant for its seizure. In *Marcus* v. *Search Warrant,* 367 U.S. 717, 732, fault was found with the fact that:

> "the warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene."

It is submitted that also in the case of movies, only by personally viewing a film is a magistrate able to "focus

searchingly on the question of obscenity", and apply the myriad complex factors which go into making that determination. Although the Supreme Court in *Lee Art Theatre* v. *Virginia,* 392 U.S. 636, 637, declined to hold that the justice of the peace in that case should have viewed the motion picture before issuing the warrant, it did so only upon the basis that such a holding was unnecessary to the decision of the case. This declination by the Court must be viewed against its later decision in *Heller* v. *New York,* 413 U.S. 483 (1973), where under the only seizure procedures yet to be thoroughly approved by the Supreme Court for seizure of this type, the judge did in fact personally view the film prior to issuing a warrant for its seizure. It would appear that this Court has recognized that only under a rule requiring a magistrate to view a film prior to ordering its seizure can the constitutional requirement of a "seaching focus" upon the issue of obscenity prior to seizure be complied with in any meaningful fashion. Also, although there is a somewhat greater imposition upon judicial resources in the case of requiring a judge to view a film as opposed to looking at printed matter, this added inconvenience becomes insignificant when it is remembered that what is at stake here is suppression of expression presumptively protected under the First Amendment.

Another consideration favoring the imposition of a requirement of judicial viewing prior to seizure is the benefit of uniformity and predictability. If magistrates are allowed to issue warrants on the basis of police officer's affidavits alleging obscenity, as occurred in this case, judicial administration may well find itself on the horns of a dilemma: either a review of the sufficiency of an affidavit will be required on an ad hoc basis in each case, or far worse, if attempts are made at standardization of what police officer's affidavits should contain in order to authorize issuance of a warrant in these cases, the result may be the equivalent of the policeman's standard testimony for intoxication, which would not be a happy result in view of

the important First Amendment considerations involved. If the Court below is correct, a judge must issue a warrant if the underlying affidavit alleges that the film depicts sexual intercourse. If this be the case what is the purpose of requiring a warrant? Sexual intercourse is objectively ascertainable by a police officer. If he sees it why should he not be permitted to seize the film, book, painting, sculpture, etc., depicting it and arrest those involved in its dissemination or exhibition?

One argument which may be anticipated to be advanced in opposition to requiring judicial viewing prior to seizure is the contention that such a requirement would introduce undue inflexibility into the proceedings and hamper law enforcement efforts. Without conceding the validity of this contention, and ignoring temporarily, for argument's sake, the consideration that inconvenience to public officials is of no persuasiveness where fundamental constitutional rights are involved, attention may be directed to two state courts cases, *People* v. *Brown,* 27 Ill. App. 3d 891, 326 N.E. 2d 568 (1965) and *Soto* v. *State,* 513 S.W. 2d 931 (Tex. Crim. App. 1974), which illustrate the flexible alternatives that are constitutionally available to law enforcement authorities in this area. In *People* v. *Brown,* a warrant was issued upon the affidavit of a police officer, but the warrant, rather than providing for seizure, provided for the finding and marking of the films (in such a way that splicings and deletions would be detectable) for later production in court at an adversary hearing. In *Soto* v. *State,* the state procedure provided for issuance, upon police complaint, of a protective order, punishable by contempt, requiring production of the film at an adversary hearing. Since these procedures avoided seizure of the films, and thus did not involve the element of prior restraint condemned in leading Supreme Court decisions and presented by the facts of the instant case, the reliance upon police affidavits was held constitutionally valid.

Should this Court declare itself against a rule requiring judicial viewing prior to seizure, as upheld below, it nevertheless remains to be determined whether the police officer's affidavit relied on here was sufficiently detailed to permit the magistrate "to focus searchingly on the question of obscenity" as required under the standard repeatedly established by the Supreme Court of the United States. The Supreme Court has clearly held, in *Marcus* v. *Search Warrant,* 367 U.S. 717 (1961), and in *Lee Art Theatre* v. *Virginia,* 392 U.S. 636, 637 (1968) that "conclusory assertions" by a police officer of the material's obscene nature are not sufficient, as they do not permit the searching judicial focus necessary to avoid suppression of that which is presumptively protected. The affidavit in this case is precisely such a conclusory assertion.

The affidavit's additonal statement of sexual acts portrayed in the film does not help toward the determination of obscenity, for the depiction of sexual acts may or may not be obscene under substantive obscenity standards. In the case of *State* v. *U & L Theatres, Inc.,* 307 So. 2d 879 (Fla. App. 3d Dist. 1974), cert. denied 316 So. 2d 295 (1975), the police officer's affidavit apparently involved a more detailed description of film contents than that contained in the affidavit in the instant case. The court there stated that the affidavit "describe[d] the contents of these films in detail; . . . generally stated, it referred to various types of sex acts." 307 So. 2d at 880. Nevertheless, the court there held that the "procedure under which the warrant issued," which, as here, involved a "perfunctory examination" of the affidavit by judge, "was not a procedure designed to focus searchingly on the issue of obscenity vel non of the materials in question." 307 So. 2d at 881.

If the affidavit underlying the warrant in the instant case had described the acts of the film as "two young girls caused an old man, whom, they called 'father' to get drunk and then indulged in an incestuous orgy in which they

performed sexual intercourse with him," the affidavit would have been more explicit than that involved herein and would have resulted in a warrant authorizing the seizure of the Bible since the scene depicted involved Noah and his two daughters after disembarking from the Ark. A judge, of course, would not issue a warrant to seize the Bible since he has read it and knows that as a whole it is not patently offensive, does not cater to a purient interest in sex and has serious literary value. The judge who issued the warrant in the instant case, however, did not see the film involved and could not make the independent searching inquiry that our hypothetical judge could and would with respect to the application to seize the Bible. This is the gravaman of the seizure without prior judicial scrutiny. It was recognized by the State Court, but was ignored below.

As has been noted herein, the issue present is that which was mentioned but not reached in *Lee Art,* which was inferred but not squarely decided in *Heller,* and which has resulted in conflicting constitutional interpretations of this Court's decisions in the State of Oklahoma. The questions are squarely presented herein, are ripe for adjudication and should be accepted by this Court if, for no other reason, than to remove whatever uncertainty exists in this area involving the exercise of the most fundamental liberty of man, his right to disseminate ideas.

CONCLUSION

The Writ should be granted, the issue adjudicated, and the seizure condemned.

Respectfully submitted,

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APPENDIX A

Judgment of Court of Appeals Affirming Denial of Motion to Supress.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JANUARY TERM—February 22, 1977

Before The Honorable John C. Pickett, Senior Judge,
The Honorable Oliver Seth and
Honorable William E. Doyle, Circuit Judges

No. 76-1616

(D.C. No. 76-59-CR)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ELDON RAYBOURNE CHRISTIAN,

Defendant-Appellant.

This cause came on for consideration on the record on appeal from the United States District Court for the Western District of Oklahoma and was submitted on the briefs at the direction of the court.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

It is the further order of this court that Eldon Raybourne Christian, appellant, shall, within ten (10) days from and

after the date of the filing of the mandate of this court in the district court, surrender himself to the custody of the United States Marshal for the Western District of Oklahoma in execution of the judgment and sentence imposed upon him.

The District Court may, in its discretion, permit the appellant to surrender directly to the designated Bureau of Prisons institution for service of sentence.

HOWARD K. PHILLIPS, Clerk

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APPENDIX B

Court of Appeals Opinion Affirming Denial of Motion to Suppress.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 76-1616

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. Cr. 76-59-T)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ELDON RAYBOURNE CHRISTIAN,

Defendant-Appellant.

Submitted: December 30, 1976

Submitted on briefs.

David L. Russell, United States Attorney, Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Herbert S. Kassner, Kassner & Detsky, New York, New York, for Defendant-Appellant.

Before PICKETT, SETH and DOYLE, Circuit Judges.

PICKETT, Circuit Judge.

This appeal presents the question of the validity of a warrant for the search and seizure of a motion picture film being shown to the public in Oklahoma City, Oklahoma, and alleged to be obscene. On February 26, 1975, the film in question was seized by Oklahoma City police in the execution of a search warrant issued by a state district judge upon the application of an Oklahoma City police officer. In a criminal prosecution against the theater manager, the state court sustained a motion to suppress, holding that the film was illegally seized and was inadmissible in the state court case. Later, federal authorities obtained possession of the film and on March 3, 1976, an indictment was returned charging appellant Christian, the operator of the Chieftain Theater in Oklahoma City, Oklahoma, with the use of a common carrier for the interstate transportation of an obscene film in violation of 18 U.S.C. § 1462. Upon trial, he was convicted and sentenced.

Christian filed a pretrial motion to suppress the use of the film as evidence in this case. The motion set forth the state criminal proceeding against the manager of the Chieftain Theater and the action of the state court in holding that the search and seizure was a violation of the constitutional rights of the accused. A copy of the affidavit upon which the search warrant was issued was attached to the motion. The affidavit contained the following statement:

> Affiant is a police officer with the Oklahoma City Police Department and was at the above location on February 26, 1975 and at that time observed a movie called "SEXUAL CUSTOMS IN SCANDINAVIA" which movie film showed unnatural copulation and simulated natural sexual acts which were filthy, morally foul, polluted,

> nasty, dirty, vulgar, debasing, having a tendency to corrupt or debauch, indecent, morally offensive and depraving lascivious, wanton and lustful, lewd, licentious, lecherous, dissolute, debauched, impure, salacious and pornographic, depicting numerous scenes of sexual intercourse male and female, one female masturbating, and unnatural copulation between male and female and affiant has reason to believe that said films are still at the above location.

The motion alleged that the warrant was issued by a judicial officer without having first viewed the film and was contrary to the requirements of Heller v. New York, 413 U.S. 483 (1973), and Hess v. State, 536 P.2d 366 (Okl. Cr. 1975).[1] The district court declined to follow the reasoning of the Oklahoma Court of Criminal Appeals and denied the motion to suppress. We agree with the conclusion of the district court.

There is no dispute as to the relevant facts. Late in December of 1974, the Chieftain Theater was closed and Christian made arrangements with the leaseholders to reopen it for the purpose of showing motion pictures to the public. After a study of the area, Christian concluded that the only feasible operation of the theater was to show pictures which were sex-oriented and for adults only. He made arrangements with Mature Pictures, Inc. of New York to furnish him motion picture films suitable for this purpose. These films were transported to the theater from New York by common carrier. Among them was the film, "Sexual Customs in Scandinavia." After the film had been shown for some time, an Oklahoma police officer entered the theater and viewed the film at a regular showing. He reported to the state district attorney for Oklahoma County,

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[1] In the *Hess* case, the Oklahoma Court of Criminal Appeals construed Heller v. New York, *supra*, and Roaden v. Kentucky, 413 U.S. 496 (1973), to require a judicial officer to view a film being shown to the public and alleged to be obscene prior to the issuance of a warrant for its seizure.

Oklahoma, and the aforesaid affidavit was prepared and executed for the purpose of obtaining a warrant to search for and seize the film. On the basis of that affidavit a state district judge concluded that there was probable cause for the issuance of a search and seizure warrant. Armed with the warrant, the police officer returned to the theater, entered the projection booth, seized the film as evidence, and arrested the manager. This was the search declared to be invalid by the state court, resulting in the termination of state criminal prosecution.

The Supreme Court of the United States, in a series of cases during the year 1973, reexamined its former standards with respect to cases relating to materials alleged to be obscene. The rule in Roth v. United States, 354 U.S. 476 (1957), to the effect that the use of obscene material is without the protection of the first Amendment to the Constitution, was reaffirmed. Miller v. California, 413 U.S. 15; Paris Adult Theatre I v. Slaton, 413 U.S. 49; United States v. Orito, 413 U.S. 139. In *Miller, supra,* the Court reviewed former definitions of obscenity as they applied to regulation by state law. There it was said:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Kois* v. *Wisconsin, supra,* at 230, quoting *Roth* v. *United States, supra,* at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the "*utterly* without redeeming social value" test of *Memoirs* v. *Massachusetts,* 383 U.S., at 419; that concept has never commanded the adherence of more than three Justices at one time. See *supra,* at 21. If a state law that regulates obscene material is thus limited, as

> written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary. . . . (413 U.S., 24, 25)

In that group of cases were Heller v. New York, *supra,* and Roaden v. Kentucky, 413 U.S. 496. These two cases considered First Amendment rights when there were seizures of motion picture films being commercially shown to the public in regularly scheduled performances. In *Heller,* certiorari was granted to determine whether a judicial officer who has previously viewed a film may constitutionally issue a warrant for the seizure of a motion picture film as evidence in a criminal case without first conducting an adversary hearing on the issue of obscenity. In upholding the search, the Court said:

> . . . This Court has never held, or even implied that there is an absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized. See *Times Film Corp.* v. *Chicago,* 365 U.S. 43 (1961); *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436, 440-442 (1957). In particular, there is no such absolute right where allegedly obscene material is seized, pursuant to a warrant, to preserve the material as evidence in a criminal prosecution. In *Lee Art Theatre* v. *Virginia, supra,* the Court went so far as to suggest that it was an open question whether a judge need "have viewed the motion picture before issuing the warrant." Here the judge viewed the entire film and, indeed, witnessed the alleged criminal act. . . . (413 U.S., 488)

The Court continued:

> . . If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a

> neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. . . . (413 U.S., 492)

Judged by any judicial standards, the sexual activities explicitly described in the officer's affidavit were "hard core" pornography, obscene, and constituted probable cause for the issuance of the warrant. United States v. Sherpix, Inc., 512 F.2d 1361 (D.C. Cir. 1975).

In *Roaden, supra,* the Court disapproved a seizure of a motion picture film by a police officer who, after having viewed the film at a regular showing, relying on his independent judgment, determined that it was obscene and made an arrest without a warrant. The substance of the Roaden decision was that such a seizure is unreasonable unless made on a warrant issued by a neutral judicial officer after a valid determination of probable cause. This rule was also recognized in *Heller.*

In *Roaden* and *Heller* the Court said that in making such seizures for evidentiary purposes they must be accomplished with the least restraint on the showing of the film until after there has been an opportunity for a prompt adversary hearing on the issue of obscenity. It was indicated that if there was a copy of the film being shown it should not be seized in the first instance. In distinguishing seizures of motion picture film from those made in other types of crimes, the Court said in *Roaden:*

> Moreover, ordinary human experience should teach that the seizure of a movie film from a commercial theater with regularly scheduled performances, where a film is being played and replayed to paid audiences, presents a very different situation from that in which contraband is changing hands or where a robbery or assault is being perpetrated. In the latter settings, the probable cause for an arrest might justify the

> seizure of weapons or other evidence or instruments of crime, without a warrant. (Citing cases) Where there are exigent circumstances in which police action literally must be "now or never" to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation. (Citing cases) The facts surrounding the "massive seizures" of books in *Marcus* and *A Quantity of Books,* or the seizure of the film in *Lee Art Theatre,* presented no such "now or never" circumstances. (413 U.S., 505, 506)

During the trial of the case there was some evidence to the effect that when the film "Sexual Customs in Scandinavia" was shipped to the Chieftain Theater there was a "back-up" copy of the film to be used in case the original was confiscated by authorities. At the time of the execution of the warrant this copy was not in the projection booth, but was secreted in a cabinet under the concession station on the first floor. It appears that several days after the execution of the warrant this back-up copy came into the possession of the state disrict atorney and so far as is known remained there. There is nothing in the record that shows the circumstances of the seizure, if it was a seizure, of the "back-up" film. The record does not disclose what occurred in state court between the time of the original seizure and when possession of the back-up film was obtained. No showing was made that there was not available a prompt adversary hearing on the issue of obscenity in the state court immediately after the initial seizure. For the first time it is contended on appeal that the seizure was an unconstitutional restraint of expression amounting to censorship as denounced in Roaden v. Kentucky, *supra.* The record does not support this contention.

AFFIRMED.

APPENDIX C

District Court Order and Opinion Denying Motion to Suppress.

IN THE UNITED STATES DICTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. 76-59-D Criminal

UNITED STATES OF AMERICA,

Plaintiff,

—VS—

ELDON RAYBOURNE CHRISTIAN,

Defendant.

ORDER

Defendant is charged in this case by an Indictment with knowingly using a common carrier for carriage in interstate commerce of an obscene, lewd, lascivious and filthy motion picture film entitled "Sexual Customs In Scandinavia" in violation of 18 U.S.C. § 1462. The Defendant has filed a Motion For Suppression Of Evidence in which he seeks to suppress the reels of film in question. It is alleged in support of said Motion that the film was seized on February 26, 1975 by authorities of the State of Oklahoma pursuant to a search warrant issued by a Judge of the District Court of Oklahoma County, State of Oklahoma. It is further urged that in a case pending in said State Court, State of Oklahoma v. Michael D. Conaughty, the Court entered an order granting a Motion to Suppress and denying the use of said film in connection with that case and that thereafter an appeal was dismissed in connection

therewith. It is urged in support of the instant Motion that the search warrant and accompanying affidavit for same were in violation of the procedure described in the case of *Heller* v. *New York,* 413 U.S. 483, 93 S.Ct. 2789, 37 L. Ed. 745 (1973). Defendant also appears to rely on the case of *Hess* v. *State,* 536 P. 2d 366 (Okla. Cr. 1975).

The Government in its Response to the instant Motion admits that the film involved herein is the same film that was seized by State authorities on February 26, 1975 pursuant to a search warrant issued by a Judge of that Court pursuant to an affidavit submitted by an Officer of the Oklahoma City Police Department. Plaintiff denies that the seizure violated the provisions of *Heller* v. *New York, supra,* and contends it was seized in accordance with the dictates of said case. It is further urged that the affidavit for the search warrant did not allege conclusory assertions of the Officers but detailed the factual basis for the conclusion and therefore was in conformance with the standards in *Marcus* v. *Search Warrant,* 367 U.S. 717, 81 S.Ct. 1708, 6 L. Ed. 2d 1127 (1961). It is urged that the New York procedure in the *Heller* case did not control the procedures pursuant to Oklahoma law wherein the film was seized. It is further urged that the fact that the film in question was suppressed in the State Court proceedings should have no bearing on the determination of the issues herein. It is further urged that the Oklahoma Court of Criminal Appeals misinterpreted the *Heller* case in deciding *Hess* v. *State of Oklahoma, supra.*

The Court set the instant Motion To Suppress for hearing on April 5, 1976. At said time the parties stipulated that the film in question in the instant case is the same as was seized by State Court officials on February 26, 1975. The parties further agreed that a Stipulation of Fact filed in State Court case No. CRM-75-613 in the District Court of Oklahoma County, State of Oklahoma, is correct and constitutes facts relating to the seizure of the film in question which the parties state is sufficient for a determination

of the motion in the instant case. There are exhibits submitted by the parties all of which constitute matters occurring in the Oklahoma State Court proceedings to include the affidavit for search warrant under which the film in question was seized.

Relevant facts in relation to the seizure in question are that Officer Ben Satterfield of the Oklahoma City Police Department prior to obtaining the search warrant in question viewed a showing of the film "Sexual Customs In Scandinavia" and thereafter executed the affidavit for search warrant prior to the same being issued by the Judge of the District Court. An examination of said warrant discloses that the Affiant stated multiple facts therein to support his belief that the film in question constituted evidence of the commission of a crime in violation of criminal statutes of the State of Oklahoma. Although this Court does not believe it is bound by the decision of the State Court Judge which suppressed the evidence in the State Court proceedings, an examination of the Order Nunc Pro Tunc setting out said Judge's ruling indicates that same was sustained upon a finding that viewing of a film by a State Police Officer was an insufficient standard to establish probable cause upon which a Magistrate could issue a search warrant. It is stated that the Court relied on the standards established in the case of *Hess* v. *State of Oklahoma, supra.*

In the instant case, the viable issue which has been raised concerning the propriety of the issuance of a search warrant in question is whether the procedures described in *Heller* v. *New York, supra,* are required to be followed prior to the issuance of a search warrant for the seizure of an allegedly obscene film being exhibited in a movie theatre open to the public.

In *Heller* v. *New York, supra,* the Court stated:

> "In Lee Art Theater v. Virginia, supra, [392 U.S. 636: 88 S.Ct. 2103, 20 L.Ed. 2d 1313 (1968)] the Court went so far as to suggest that it was an open question whether a judge need 'have viewed the motion picture before issuing a warrant' id., at 637."

Following the preceding quotation the Court in *Heller* v. *New York, supra,* quoted from *Lee Art Theater* v. *Virginia,* in Footnote 4 as follows:

> "However, we need not decide in this case whether the Justice of Peace should have viewed the motion picture before issuing the warrant."

This Court determines that the procedures approved in *Heller* were thus not mandated by *Heller* and the question as to whether a magistrate should view a film prior to issuing a warrant continued to be an open question even after *Heller, supra,* was decided. The Oklahoma State Court was obliged to follow the dictates of *Hess* v. *State, supra,* wherein the Oklahoma Court of Criminal Appeals construed *Heller* v. *New York, supra,* to require that the judge issuing the search warrant view the film prior to the issuance of same. This Court does not so construe *Heller* v. *New York, supra,* and thus declines to follow *Hess* v. *State, supra.*

An examination of the affidavit for search warrant discloses that the affiant stated facts therein which were more than conclusory to the question of obscenity. The affidavit for search warrant indicates that it was sworn to before the Judge of the District Court who issued said warrant and thus the Court had the opportunity to make any inquiry it felt necessary of the affiant concerning the facts set out in the Affidavit in question. It is the finding of this Court that the Motion for the Suppression of Evidence requesting that the reels of film in question entitled "Sexual Customs In Scandinavia" be suppressed is denied.

It is so ordered this 5th day of April, 1976.

FRED DAUGHERTY
United States District Judge

APPENDIX D

Affidavit for Search Warrant and Search Warrant.

AFFIDAVIT FOR SEARCH WARRANT

THE STATE OF OKLAHOMA }
COUNTY OF OKLAHOMA } ss.:

(1) BEN SATTERFIELD, Affiant, being first duly sworn, on oath deposes and says that the following property constitutes evidence of the commission of a crime:

(2) One Color Movie film showing simulated natural sexual acts and unnatural copulation acts in violation of 21 O.S.A. 1040.8.

(3) and that the above mentioned property is now located as follows: A movie theater known as the Chieftian Theater located at 3450 Southwest 29 in the City of Oklahoma City, Oklahoma County, State of Oklahoma.

(4) based upon the following facts: Affiant is a police officer with the Oklahoma City Police Department and was at the above location on February 26, 1975 and at that time observed a movie called "SEXUAL CUSTOMS IN SCANDINAVIA" which movie film showed unnatural copulation and simulated natural sexual acts which were filthy, morally foul, polluted, nasty, dirty, vulgar, debasing, having a tendency to corrupt or debauch, indecent, morally offensive and depraving lascivious, wanton and lustful, lewd, licentious, lecherous, dissolute, debauched, impure, salacious and pornographic, depicting numerous scenes of sexual intercourse male and female, one female masturbating, and unnatural copulation between male and female and affiant has reason to believe that said films are still at the above location.

(5) BEN SATTERFIELD
Affiant

Subscribed and sworn to before me this 26 day of February, 1975.

(6) HOMER SMITH
Judge of the District Court
Oklahoma County, Oklahoma

SEARCH WARRANT

IN THE NAME OF THE STATE OF OKLAHOMA,
TO: ANY SHERIFF, OR POLICEMAN IN OKLAHOMA COUNTY, OKLAHOMA.

(1) The above affidavit having been sworn to by the Affiant, BEN SATTERFIELD, before me this day, based upon the facts stated therein, probable cause having been found, I command you at any time of the day or night to search for the following described property and things, and make a return according to law:

(2) One color movie film showing unnatural copulation and simulated natural sexual acts in violation of 21 O.S.A. 1040.8.

(3) said search to be conducted at the following described location: A movie theater known as the Chieftian Theater located at 3450 Southwest 29 in the City of Oklahoma City, Oklahoma County, State of Oklahoma. Issued under my hand this 26 day of February, 1975.

(4) HOMER SMITH
Judge of the District Court
Oklahoma County, Oklahoma

APPENDIX E

Order of District Court of Oklahoma County of State of Oklahoma Granting Petitioner's Motion to Suppress.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

No. CRM-75-613

THE STATE OF OKLAHOMA,
Plaintiff

vs.

MICHAEL D. CONAUGHTY,
Defendant

ORDER SUSTAINING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND DEMURRER TO THE EVIDENCE

Now on the 20th day of February, 1976, the above styled and numbered cause comes on before me for trial, both the defendant and State having waived their respective right to have a jury hear the evidence; the defendant appears in person and by his attorney, Barry Albert, and the State of Oklahoma appears by WILLIAM MARK BLASDEL, Assistant District Attorney.

The Court, having accepted certain stipulated facts which were entered into the record and having reviewed the files, including the pleadings and motions contained therein, and having heard the arguments of counsel and being fully advised in the premises, finds that the Motion to Suppress Evidence of a film entitled "SEXUAL PRACTICES IN SCANDINAVIA" urged during the trial on behalf of defendant should be sustained for the reason that no member of the

Judiciary established the requisite probable cause as set out in *Hess* vs. *State,* Okl.Cr. 536 P.2d 366 (1975).

The Court further finds that the defendant's demurrer to the evidence, which was presented at the end of the state's case, should also be sustained and a verdict of not guilty be directed in defendant's favor.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT, that the motion to Suppress Evidence and subsequent Demurrer to the Evidence urged by defendant be, and the same is hereby sustained; to which ruling the State of Oklahoma excepts and exceptions are allowed.

CRESTON B. WILLIAMSON
JUDGE OF THE DISTRICT COURT

OK:
BARRY ALBERT
ATTORNEY FOR DEFENDANT

WILLIAM MARK BLASDEL
ASSISTANT DISTRICT ATTORNEY

APPENDIX F

Stipulation of Fact.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

No. CRM-75-613

STATE OF OKLAHOMA,

Plaintiff,

vs.

MICHAEL D. CONAUGHTY,

Defendant.

STIPULATION OF FACT

On the 19th day of June, 1975, a Motion to Suppress Evidence, which had previously been filed on behalf of defendant, was heard by Special District Court Judge Creston B. Williamson. The object of the motion was to suppress a movie film, "Sexual Customs in Scandinavia", held by the District Attorney's Office as evidence in the present case. Said movie film was obtained from the Chieftain Theater on February 26, 1975, pursuant to a search warrant signed that same day by District Judge Homer Smith and served by Ben Satterfield of the Oklahoma City Police Department. Prior to obtaining the warrant, Officer Satterfield had viewed an earlier showing of the film on that same day. He was the affiant in the Affidavit For Search Warrant. The defendant herein was charged with exhibiting obscene movies in his managerial capacity as prohibited by 21 O.S.A. 1040.8.

The sole issue in the motion was whether the viewing of films by a police officer depicting sexual intercourse is a sufficient standard to establish probable cause upon which a magistrate can issue a search warrant.

Judge Williamson, on hearing the said motion, took the matter under advisement for 24 hours and on June 20, 1975, ordered that the introduction of the film into evidence be suppressed. No oral argument by either counsel was presented other than to urge the Court to review recent case law and thus no court reporter was summoned.

WILLIAM MARK BLASDEL
Attorney for State

BARRY ALBERT
Attorney for Defendant

I, DAN GRAY, Court Clerk for Oklahoma County, Okla., hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears of record in the District Court Clerk's Office of Oklahoma County, Okla., this 5 day of April, 1976.

DAN GRAY, Court Clerk
By (Illegible) Deputy